STATE OF MICHIGAN
IN THE SUPREME COURT

JESSICA A. DILLON,

Plaintiff/Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant/Appellant.

Supreme Court Case No. 153936

Court of Appeals Case No. 324902

Isabella County Circuit Court
Case No. 12-10464-NF

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REPLY BRIEF SUPPORTING DEFENDANT/APPELLANT STATE FARM'S APPLICATION FOR LEAVE TO APPEAL

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1. Introduction

Plaintiff's argument that "strict, technical compliance" with a statute of limitations is not required demonstrates why this Court's review in this case is so important. (Appellee's Response at 15.) "This Court has prided itself on its commitment to the rule of law, and in particular a return to fundamental constitutional principles regarding judicial interpretation of statutes." *Progressive Michigan Ins Co v Smith*, 490 Mich 977, 979-80 (2011) (Young, C.J., concurring). One of those fundamental principles is that statutes are enforced "as written," *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686, 690 (2001), and that when a statute as written clearly and unambiguously requires certain action, "close enough" is not good enough. *Progressive*, 490 Mich at 978.

The Court of Appeals opinion here represents a slide back to the dark days when judges interpreted statutes not "as written," but rather according to their own ideas about how the case should come out. The statute here, MCL 500.3145(1), clearly and unambiguously provides that a plaintiff may not commence an action later than one year after an automobile accident unless the plaintiff provides "written notice of injury," including a description of the "nature" of his or her injury, within that first year. Here, it is *undisputed* that there is no written document anywhere in the record that Plaintiff sent to State Farm within one year of her accident that contains a description of the nature of *any* injury—hip, back, or anything else. And even the *oral* notice she gave did not describe the actual injury for which she sought recovery of benefits in the lawsuit she filed four years later.

Plaintiff's action is barred by the clear and unambiguous one-year statute of limitations of MCL 500.3145(1). This Court should either peremptorily reverse or grant leave to appeal to make clear that MCL 500.3145(1) must be enforced as written.

2. State Farm preserved the argument that Plaintiff's oral notice was insufficient to meet the "written" notice requirement of MCL 500.3145(1) by expressly making this argument in both the trial court and the Court of Appeals.

Plaintiff argues that State Farm failed to properly preserve below the issue of Plaintiff's failure to file "written" notice, and that the Court should "treat the issue as abandoned." (Plaintiff's Br. at 1.) But State Farm expressly made this argument below, both in the trial court and in the Court of Appeals.

In both courts, State Farm expressly argued that MCL 500.3145(1) permitted an action to be filed more than one year after the accident "***only if written notice***" is provided, and "as this did not occur, Plaintiff's claim is barred by MCL 500.3145." (App A, Brief in Support of Defendant's Motion for Summary Disposition, p. 12; App B, Appellant's Br. at 11, 12; emphasis in original.) State Farm further argued that it was "undisputed that Plaintiff failed to give State Farm ***any*** notice, let alone ***written*** notice, of a left hip injury until more than one year after her motor vehicle accident." (*Id.*; emphasis in original.) And State Farm further argued that "[e]ven allowing Plaintiff to escape the ***written*** notice requirement of MCL 500.3145, Defendant, State Farm, did not receive ***verbal*** notice that Plaintiff had been having problems with her left hip until her mother left a voicemail message with Defendant on February 27, 2012, nearly three and a half years after the accident." (*Id.*; emphasis in original.)

Thus State Farm has consistently and repeatedly argued throughout this case that Plaintiff's notice of injury was deficient for two reasons, either of which bar her action: (1) the notice was oral, not written; and (2) the oral notice failed to give notice of the actual injury for which she sought recovery of benefits from State Farm. State Farm preserved both arguments in the lower courts, and this Court may properly review them here. *See Caudill v State Farm Mut Auto Ins Co*, 485 Mich 1107, 1113; 779 NW2d 83, 88 (2010) ("this matter is appropriate for appellate review because . . . defendant raised and preserved" the argument below).

3. Plaintiff's oral notice did not meet the "written" notice requirement of the statute.

It should go without saying that oral notice does not satisfy a written notice requirement. Plaintiff has failed to identify *any* writing sent by her to State Farm within one year of the accident that even purports to satisfy the express requirements of MCL 500.3145(1). Her claims against State Farm are therefore barred by the one-year statute of limitations. *See Jesperson v Auto Club Ins Assoc*, 499 Mich 29, 37 n 4; 878 NW2d 799 (2016) ("MCL 500.3145(1) requires the notice to be in writing"; thus "if the insured, for example, provided the insurer with only *oral* notice of the injury within one year of the accident . . . the notice exception would not apply because written notice had not been provided").

Plaintiff argues that her oral notice somehow satisfied the "written" notice requirement of MCL 500.3145(1) because, even though *she* did not provide written notice, her oral notice was "memorialized in writing by the adjuster" at State Farm. (Appellee's Response at 3, 5.) Plaintiff argues that "there should be no difference between the adjustor, Denise Pierce, transcribing the report into written form versus one of the Dillons." (*Id.* at 23.)

But it is the *statute* that draws that distinction. The statute clearly and unambiguously states that the written notice as provided in the statute must be "given *to* the insurer" "*by* a person claiming to be entitled to benefits therefor, or by someone in his behalf." MCL 500.3145(1) (emphasis added). The statute does not say that a plaintiff's oral notice is somehow sufficient if it is "memorialized in writing" by the insurer. This is precisely the sort of "close enough" argument that this Court has repeatedly rejected. *Progressive*, 490 Mich at 978. MCL

500.3145(1) expressly requires "written" notice by the plaintiff, and this requirement *must* be enforced "as written." *Wickens*, 465 Mich at 60.[1]

There is no getting around the fact that there is no written document in the record sent by the Plaintiff to State Farm within one year of the accident describing the nature of *any* injury. It simply does not exist, and thus Plaintiff could not possibly have satisfied the "written" notice requirement of MCL 500.3145(1). Because this is such a blatant example of the Court of Appeals failing to follow the plain language of the statute, peremptory reversal on this ground is warranted.

4. The plain language of the statute refutes Plaintiff's argument that MCL 500.3145(1) "only requires timely notification that an accident occurred which involved injury."

As to whether her *oral* notice was sufficient to satisfy the statute, Plaintiff argues that MCL 500.3145(1) "only requires timely notification that an accident occurred which involved injury." (Appellee's Response at 25.) The Court of Appeals held the same thing, holding that the statute only requires notice of "the mere fact that an accident resulted in some injury." (Slip Op at 7.)

This construction of MCL 500.3145(1) would read key provisions right out of the statute. The statute expressly requires a plaintiff to indicate in ordinary language "the time, place and nature of his injury." But if, as Plaintiff and the Court of Appeals urge, the statute merely requires notification that an accident "involved injury" or "resulted in some injury," then the requirement that the plaintiff describe the "*nature*" of her injury would be surplusage: A plaintiff could satisfy the statute simply by indicating the time and place of his injury, without

[1] The Court of Appeals cases Plaintiff cites in favor of this close-enough, "substantial compliance" argument further highlight the need for this Court to grant leave to appeal. *See Dozier v State Farm Mut Auto Ins Co*, 95 Mich App 121 (1980); *Lansing Gen Hosp Osteopathic v Gomez*, 114 Mich App 814 (1982); *Walden v Auto-Owners Ins Co*, 105 Mich App 528 (1981).

ever indicating the "nature" of his injury. Thus this requirement would be rendered surplusage or nugatory. But that is not how courts must read statutes: "In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens*, 465 Mich at 60; *Jesperson*, 499 Mich at 37 (courts "must avoid an interpretation that renders [statutory text] all but surplusage").

Plaintiff responds that it would be unfair to require her to describe "each and every conceivable injury caused by the accident whether she knew of the connection or not," because "often the specific cause of certain injuries is not manifested within one year." (Appellee's Resp. at 9, 11.) But this was the Legislature's judgment to make, and it decided that one year was a reasonable compromise that would permit the vast majority of legitimate claimants to recover—because most injuries from a car accident will be evident within a year of the accident—while protecting insurers (and thus their customers by way of premiums) from stale or fabricated claims. As with any statute of limitations, there is an inherent issue of fairness at the margins—why should someone who gives notice a year and a day after the accident be treated differently from someone who gave notice a year minus a day? But Legislatures must draw lines somewhere, and when the Legislature draws the line at a year, a court's duty is to enforce that line as written, not to substitute its own judgment about what a fair line would be. *See Devillers v Auto Club Ins Assoc*, 473 Mich 562, 586; 702 NW2d 539 (2005) ("MCL 500.3145(1) must be enforced by the courts of this state as our Legislature has written it, not as the judiciary would have had it written").

5. Plaintiff's and the Court of Appeals' reading of the statute runs counter to this Court's express holding in *Jesperson*.

Under Plaintiff's and the Court of Appeals' reading of MCL 500.3145(1), all a plaintiff has to do is provide notice of "some" injury within one year of the accident, and then this will

permit a plaintiff to file an action four years, ten years, twenty years later, relating to "*any*" other injury. (Slip Op at 4; emphasis added.) Both Plaintiff and the Court of Appeals pin this reading almost entirely on the lack of the definite article "the" in "notice of injury" in the statute, which they argue suggests that the statute is not referring to any specific injury. (*See* Plaintiff's Resp at 19: "If MCL 500.3145 had been written with "*the*" injury as opposed to how it is written with the words '*of injury*' State Farm's position would be valid"; Slip Op at 3: calling the word "the" "conspicuously absent.")

But as State Farm pointed out in its application, that is not how this Court recently read the statute in *Jesperson v Auto Club Ins Assoc*, 499 Mich 29; 878 NW2d 799 (2016). The Court there expressly (and unanimously) held that a plaintiff must give "notice of *the* injury":

> We hold that the first sentence of MCL 500.3145(1) allows for an action for no-fault benefits to be filed more than one year after the date of *the accident causing the injury* if the insurer has either received *notice of the injury* within one year of the accident or has made a payment of no-fault benefits for the injury at any time before the action is commenced.

Jesperson, 299 Mich at 39 (emphasis added).

Plaintiff brushes this off as "merely dicta," because the primary issue in the case was interpretation of the "payment" exception in MCL 500.3145(1), rather than the "notice" exception. (Appellee's Resp at 24.) But this certainly was not dicta. After all, the sentence begins: "*We hold . . .*" *Jesperson*, 299 Mich at 39 (emphasis added). Sometimes the line between dicta and controlling language is hard to define; but here it is not. State Farm is aware of no case, ever, in which a sentence that begins "we hold" was considered dicta.

State Farm is thus not attempting to "add words" into the statute, as Plaintiff suggests. (Appellee's Resp. at 19.) Rather, as this Court held in *Jesperson*, the fair and reasonable reading of MCL 500.3145(1) is that it requires a plaintiff to give written notice of *the injury* for which she seeks to recover benefits in her lawsuit, including a description of the nature of that injury, in

order to extend the one-year statute of limitations. Plaintiff failed to do so here, and thus her action is barred by MCL 500.3145(1).

6. Plaintiff's remaining arguments fail.

Plaintiff argues that State Farm somehow "waived its right to assert the insufficiency of the notice," because "[a]t no time did [State Farm] ever indicate to the Plaintiff that without additional information they were unable to appropriately evaluate the claim." (Appellee's Resp at 16.) But that turns the notice requirement on its head. How could State Farm request "additional information" about an injury Plaintiff never mentioned, and that Plaintiff claims *she* didn't even know about until four years later? Under the plain and unambiguous language of MCL 500.3145(1), it was the *Plaintiff's* obligation to provide the required notice of injury as set forth in the statute. *See* MCL 500.3145(1). It was not State Farm's obligation to guess as to other injuries that the Plaintiff might someday have. *See id.*[2]

Plaintiff also argues that State Farm's policy "only requires that information be provided as soon as reasonably possible after treatment for the injury," not necessarily within one year of the injury. (Appellee's Response at 17.) But as State Farm showed in its application, the policy requirements and the statute-of-limitations requirements are independent, and the Plaintiff must meet both to have a viable claim. (*See* Application at 18 n 7.) In other words, even if the Plaintiff could show that she met the *contractual* notice requirements set forth in her policy, her

[2] Plaintiff also argues that State Farm's adjuster "admitted that notice of injury was provided by Ms. Dillon within one year." (Appellee's Resp at 18.) But the passage Plaintiff quotes plainly shows that the adjuster testified that notice of *an* injury was provided within one year—the road-rash injuries—but not notice of the hip injury for which Plaintiff actually sought recovery of benefits. (*See id.* at 19, quoting Pierce dep at p. 51.)

claim would still fail because she plainly did not meet the statutory requirements of MCL 500.3145(1).[3]

7. Conclusion

At bottom, the Plaintiff did not comply with the express requirements of MCL 500.3145(1). Plaintiff did not send any written document to State Farm within one year of the accident describing the nature of *any* injury, and her oral notice did not describe the nature of the actual injury for which she seeks recovery of benefits from State Farm. The statute of limitations for filing her action was therefore one year from the date of the accident under the plain terms of the statute. Her action was filed more than *four* years after the date of the accident, so her action is barred by the plain terms of MCL 500.3145(1). This Court should grant leave to appeal or peremptorily reverse to enforce the plain terms of MCL 500.3145(1) and clarify to the Court of Appeals and all litigants that a plaintiff does indeed have to comply with the statute as written.

Respectfully submitted,

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[3] Plaintiff also asserts that trial testimony and State Farm's claim file "suggest" that benefits were paid related to the road-rash injuries. (Appellee's Response at 2 n 1, 5.) This is incorrect—no payments were made. It is also immaterial—no party argues that the "payment" exception applies in this case, and the Court of Appeals did not hold otherwise.